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## **SENATE BILL**

**No. 178**

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### **Introduced by Senators Leno and Anderson**

(Principal coauthor: Assembly Member Gatto)

**(Coauthors: Senators Cannella, Gaines, Hertzberg, Hill, McGuire,  
Nielsen, and Roth)**

(Coauthors: Assembly Members Chiu, ~~Dalle~~, Gordon, Maienschein,  
Oberholte, Quirk, Ting, and Weber)

February 9, 2015

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An act to add Chapter 3.6 (commencing with Section 1546) to Title 12 of Part 2 of the Penal Code, relating to privacy.

#### LEGISLATIVE COUNSEL'S DIGEST

SB 178, as amended, Leno. Privacy: electronic communications: search warrant.

(1) Existing law provides that a search warrant may only be issued upon probable cause, supported by affidavit, naming or describing the person to be searched or searched for, and particularly describing the

property, thing, or things and the place to be searched. Existing law also states the grounds upon which a search warrant may be issued, including, among other grounds, when the property or things to be seized consist of any item or constitute any evidence that tends to show a felony has been committed, or tends to show that a particular person has committed a felony, or when there is a warrant to arrest a person.

This bill would prohibit a government entity from compelling the production of or access to electronic communication information or electronic device information, as defined, without a search warrant, wiretap order, ~~or~~ order for electronic reader records, *or subpoena issued pursuant under specified conditions*, except for emergency situations, as defined. *The bill would also specify the conditions under which a government entity may access electronic device information by means of physical interaction or electronic communication with the device, such as pursuant to a search warrant, wiretap order, or consent of the owner of the device.* The bill would define a number of terms for those purposes, including, among others, “electronic communication information” and “electronic device information,” which the bill defines collectively as “electronic information.” The bill would require a search warrant for electronic information to describe with particularity the information to be seized and would impose other conditions on the use of the search warrant or wiretap order and the information obtained, including retention, sealing, and disclosure. The bill would require a warrant directed to a service provider to be accompanied by an order requiring the service provider to verify by affidavit the authenticity of electronic information that it produces, as specified. The bill would authorize a service provider to voluntarily disclose, when not otherwise prohibited by state or federal law, electronic communication information or subscriber information, and would require a government entity to destroy information so provided within 90 days, subject to specified exceptions. The bill would, subject to exceptions, require a government entity that executes a search warrant pursuant to these provisions to contemporaneously provide notice, as specified, to the identified target, that informs the recipient that information about the recipient has been compelled or requested, and that states the nature of the government investigation under which the information is sought. The bill would authorize a delay of 90 days, subject to renewal, for providing the notice under specified conditions that constitute an emergency. The bill would require the notice to include a copy of the warrant or statement describing the emergency under which the notice was delayed. The bill

would provide that any person in a trial, hearing, or proceeding may move to suppress any electronic information obtained or retained in violation of its provisions, according to specified procedures. The bill would provide that a California or foreign corporation, and its officers, employees, and agents, are not subject to any cause of action for providing records, information, facilities, or assistance in accordance with the terms of a warrant, wiretap order, or other order issued pursuant to these provisions.

(2) The California Constitution provides for the Right to Truth in Evidence, which requires a  $\frac{2}{3}$  vote of the Legislature to exclude any relevant evidence from any criminal proceeding, as specified.

Because this bill would exclude evidence obtained or retained in violation of its provisions in a criminal proceeding, it requires a  $\frac{2}{3}$  vote of the Legislature.

Vote:  $\frac{2}{3}$ . Appropriation: no. Fiscal committee: yes.  
State-mandated local program: no.

*The people of the State of California do enact as follows:*

1 SECTION 1. Chapter 3.6 (commencing with Section 1546) is  
2 added to Title 12 of Part 2 of the Penal Code, to read:

3  
4 CHAPTER 3.6. ELECTRONIC COMMUNICATIONS PRIVACY ACT  
5

6 1546. For purposes of this chapter, the following definitions  
7 apply:

8 (a) An “adverse result” means any of the following:

9 (1) Danger to the life or physical safety of an individual.

10 (2) Flight from prosecution.

11 (3) Destruction of or tampering with evidence.

12 (4) Intimidation of potential witnesses.

13 (5) Serious jeopardy to an investigation or undue delay of a  
14 trial.

15 (b) “Authorized possessor” means the possessor of an electronic  
16 device when that person is the owner of the device or has been  
17 authorized to possess the device by the owner of the device.

18 (c) “Electronic communication” means the transfer of signs,  
19 signals, writings, images, sounds, data, or intelligence of any nature  
20 in whole or in part by a wire, radio, electromagnetic, photoelectric,  
21 or photo-optical system.

(d) “Electronic communication information” means any information about an electronic communication or the use of an electronic communication service, including, but not limited to, the contents, sender, recipients, format, or location of the sender or recipients at any point during the communication, the time or date the communication was created, sent, or received, or any information pertaining to any individual or device participating in the communication, including, but not limited to, an IP address. Electronic communication information does not include subscriber information as defined in this chapter.

(e) “Electronic communication service” means a service that provides to its subscribers or users the ability to send or receive electronic communications, including any service that acts as an intermediary in the transmission of electronic communications, or stores electronic communication information.

(f) “Electronic device” means a device that stores, generates, or transmits information in electronic form.

(g) “Electronic device information” means any information stored on or generated through the operation of an electronic device, including the current and prior locations of the device.

(h) “Electronic information” means electronic communication information or electronic device information.

(i) “Government entity” means a department or agency of the state or a political subdivision thereof, or an individual acting for or on behalf of the state or a political subdivision thereof.

(j) “Service provider” means a person or entity offering an electronic communication service.

(k) “Specific consent” means consent provided directly to the government entity seeking information, including, but not limited to, when the government entity is the addressee or intended recipient or a member of the intended audience of an electronic communication. *Specific consent does not require that the originator of the communication have actual knowledge that an addressee, intended recipient, or member of the specific audience is a government entity.*

(l) “Subscriber information” means the name, street address, telephone number, email address, or similar contact information provided by the subscriber to the provider to establish or maintain an account or communication channel, a subscriber or account

1 number or identifier, the length of service, and the types of services  
2 used by a user of or subscriber to a service provider.

3 1546.1. (a) Except as provided in this section, a government  
4 entity shall not do any of the following:

5 (1) Compel the production of or access to electronic  
6 communication information from a service provider.

7 (2) Compel the production of or access to electronic device  
8 information from any person or entity other than the authorized  
9 possessor of the device.

10 (3) Access electronic device information by means of physical  
11 interaction or electronic communication with the electronic device.  
12 This section does not prohibit the intended recipient of an electronic  
13 communication from voluntarily disclosing electronic  
14 communication information concerning that communication to a  
15 government entity.

16 (b) A government entity may compel the production of or access  
17 to electronic communication information from a service provider,  
18 or compel the production of or access to electronic device  
19 information from any person or entity other than the authorized  
20 possessor of the device only under the following circumstances:

21 (1) Pursuant to a warrant issued pursuant to Chapter 3  
22 (commencing with Section 1523) and subject to subdivision (d).

23 (2) Pursuant to a wiretap order issued pursuant to Chapter 1.4  
24 (commencing with Section 629.50) of Title 15 of Part 1.

25 (3) Pursuant to an order for electronic reader records issued  
26 pursuant to Section 1798.90 of the Civil Code.

27 (4) *Pursuant to a subpoena issued pursuant to existing state*  
28 *law, provided that the information is not sought for the purpose*  
29 *of investigating or prosecuting a criminal offense, and compelling*  
30 *the production of or access to the information via the subpoena is*  
31 *not otherwise prohibited by state or federal law. Nothing in this*  
32 *paragraph shall be construed to expand any authority under state*  
33 *law to compel the production of or access to electronic information.*

34 (c) A government entity may access electronic device  
35 information by means of physical interaction or electronic  
36 communication with the device only as follows:

37 (1) Pursuant to a warrant issued pursuant to Chapter 3  
38 (commencing with Section 1523) and subject to subdivision (d).

39 (2) Pursuant to a wiretap order issued pursuant to Chapter 1.4  
40 (commencing with Section 629.50) of Title 15 of Part 1.

1 (3) With the specific consent of the authorized possessor of the  
2 device.

3 (4) With the specific consent of the owner of the device, only  
4 when the device has been reported as lost or stolen.

5 (5) If the government entity, in good faith, believes that an  
6 emergency involving danger of death or serious physical injury to  
7 any person requires access to the electronic device information.

8 (6) If the government entity, in good faith, believes the device  
9 to be lost, stolen, or abandoned, provided that the entity shall only  
10 access electronic device information in order to attempt to identify,  
11 verify, or contact the owner or authorized possessor of the device.

12 (7) *Except where prohibited by state or federal law, if the device*  
13 *is seized from an inmate's possession or found in an area of a*  
14 *correctional facility under the jurisdiction of the Department of*  
15 *Corrections and Rehabilitation where inmates have access and*  
16 *the device is not in the possession of an individual and the device*  
17 *is not known or believed to be the possession of an authorized*  
18 *visitor. Nothing in this paragraph shall be construed to supersede*  
19 *or override Section 4576.*

20 (d) Any warrant for electronic information shall comply with  
21 the following:

22 (1) The warrant shall describe with particularity the information  
23 to be seized by specifying the time periods covered and, as  
24 appropriate and reasonable, the target individuals or accounts, the  
25 applications or services covered, and the types of information  
26 sought.

27 (2) The warrant shall require that any information obtained  
28 through the execution of the warrant that is unrelated to the  
29 objective of the warrant shall be sealed and not subject to further  
30 review, use, or disclosure without a court order. A court shall issue  
31 such an order upon a finding that there is probable cause to believe  
32 that the information is relevant to an active investigation, or review,  
33 use, or disclosure is required by state or federal law.

34 (3) The warrant shall comply with all other provisions of  
35 California and federal law, including any provisions prohibiting,  
36 limiting, or imposing additional requirements on the use of search  
37 warrants. If directed to a service provider, the warrant shall be  
38 accompanied by an order requiring the service provider to verify  
39 the authenticity of electronic information that it produces by  
40 providing an affidavit that complies with the requirements set forth

1 in Section 1561 of the Evidence Code. Admission of that  
2 information into evidence shall be subject to Section 1562 of the  
3 Evidence Code.

4 (e) When issuing any warrant or order for electronic information,  
5 or upon the petition from the target or recipient of the warrant or  
6 order, a court may, at its discretion, do any or all of the following:

7 (1) Appoint a special master, as described in subdivision (d) of  
8 Section 1524, charged with ensuring that only information  
9 necessary to achieve the objective of the warrant or order is  
10 produced or accessed.

11 (2) Require that any information obtained through the execution  
12 of the warrant or order that is unrelated to the objective of the  
13 warrant be destroyed as soon as feasible after the termination of  
14 the current investigation and any related investigations or  
15 proceedings.

16 (f) A service provider may voluntarily disclose electronic  
17 communication information or subscriber information when that  
18 disclosure is not otherwise prohibited by state or federal law.

19 (g) If a government entity receives electronic communication  
20 information voluntarily provided pursuant to subdivision (f), it  
21 shall destroy that information within 90 days unless one or more  
22 of the following circumstances apply:

23 (1) The entity has or obtains the specific consent of the sender  
24 or recipient of the electronic communications about which  
25 information was disclosed.

26 (2) The entity obtains a court order authorizing the retention of  
27 the information. A court shall issue a retention order upon a finding  
28 that the conditions justifying the initial voluntary disclosure persist,  
29 in which case the court shall authorize the retention of the  
30 information only for so long as those conditions persist, or there  
31 is probable cause to believe that the information constitutes  
32 evidence that a crime has been committed.

33 (3) The entity reasonably believes that the information relates  
34 to child pornography and the information is retained as part of a  
35 multiagency database used in the investigation of child  
36 pornography and related crimes.

37 (h) If a government entity obtains electronic information  
38 pursuant to an emergency involving danger of death or serious  
39 physical injury to a person, that requires access to the electronic  
40 information without delay, the entity shall, within three days after

1 obtaining the electronic information, file with the appropriate court  
2 an application for a warrant or order authorizing obtaining the  
3 electronic information or a motion seeking approval of the  
4 emergency disclosures that shall set forth the facts giving rise to  
5 the emergency, and if applicable, a request supported by a sworn  
6 affidavit for an order delaying notification under paragraph (1) of  
7 subdivision (b) of Section 1546.2. The court shall promptly rule  
8 on the application or motion and shall order the immediate  
9 destruction of all information obtained, and immediate notification  
10 pursuant to subdivision (a) of Section 1546.2 if such notice has  
11 not already been given, upon a finding that the facts did not give  
12 rise to an emergency or upon rejecting the warrant or order  
13 application on any other ground.

14 (i) This section does not limit the authority of a government  
15 entity to use an administrative, grand jury, trial, or civil discovery  
16 subpoena to do any of the following:

17 (1) Require an originator, addressee, or intended recipient of  
18 an electronic communication to disclose any electronic  
19 communication information associated with that communication.

20 (2) Require an entity that provides electronic communications  
21 services to its officers, directors, employees, or agents for the  
22 purpose of carrying out their duties, to disclose electronic  
23 communication information associated with an electronic  
24 communication to or from an officer, director, employee, or agent  
25 of the entity.

26 (3) Require a service provider to provide subscriber information.

27 1546.2. (a) Except as otherwise provided in this section, any  
28 government entity that executes a warrant, or obtains electronic  
29 information in an emergency pursuant to Section 1546.1, shall  
30 serve upon, or deliver to by registered or first-class mail, electronic  
31 mail, or other means reasonably calculated to be effective, the  
32 identified targets of the warrant or emergency request, a notice  
33 that informs the recipient that information about the recipient has  
34 been compelled or requested, and states with reasonable specificity  
35 the nature of the government investigation under which the  
36 information is sought. The notice shall include a copy of the  
37 warrant or a written statement setting forth facts giving rise to the  
38 emergency. The notice shall be provided contemporaneously with  
39 the execution of a warrant, or, in the case of an emergency, within  
40 three days after obtaining the electronic information.

1 (b) (1) When a warrant is sought or electronic information is  
2 obtained in an emergency under Section 1546.1, the government  
3 entity may submit a request supported by a sworn affidavit for an  
4 order delaying notification and prohibiting any party providing  
5 information from notifying any other party that information has  
6 been sought. The court shall issue the order if the court determines  
7 that there is reason to believe that notification may have an adverse  
8 result, but only for the period of time that the court finds there is  
9 reason to believe that the notification may have that adverse result,  
10 and not to exceed 90 days.

11 (2) The court may grant extensions of the delay of up to 90 days  
12 each on the same grounds as provided in paragraph (1).

13 (3) Upon expiration of the period of delay of the notification,  
14 the government entity shall serve upon, or deliver to by registered  
15 or first-class mail, electronic mail, or other means reasonably  
16 calculated to be effective as specified by the court issuing the order  
17 authorizing delayed notification, the identified targets of the  
18 warrant, a document that includes the information described in  
19 subdivision (a), a copy of all electronic information obtained or a  
20 summary of that information, including, at a minimum, the number  
21 and types of records disclosed, the date and time when the earliest  
22 and latest records were created, and a statement of the grounds for  
23 the court's determination to grant a delay in notifying the  
24 individual.

25 (c) If there is no identified target of a warrant or emergency  
26 request at the time of its issuance, the government entity shall  
27 submit to the Department of Justice within three days of the  
28 execution of the warrant or issuance of the request all of the  
29 information required in subdivision (a). If an order delaying notice  
30 is obtained pursuant to subdivision (b), the government entity shall  
31 submit to the department upon the expiration of the period of delay  
32 of the notification all of the information required in paragraph (3)  
33 of subdivision (b). The department shall publish all those reports  
34 on its Internet Web site within 90 days of receipt. *The department*  
35 *may redact names or other personal identifying information from*  
36 *the reports.*

37 (d) Except as otherwise provided in this section, nothing in this  
38 chapter shall prohibit or limit a service provider or any other party  
39 from disclosing information about any request or demand for  
40 electronic information.

1 1546.4. (a) Any person in a trial, hearing, or proceeding may  
2 move to suppress any electronic information obtained or retained  
3 in violation of the Fourth Amendment to the United States  
4 Constitution or of this chapter. The motion shall be made,  
5 determined, and be subject to review in accordance with the  
6 procedures set forth in subdivisions (b) to (q), inclusive, of Section  
7 1538.5.

8 (b) The Attorney General may commence a civil action to  
9 compel any government entity to comply with the provisions of  
10 this chapter.

11 (c) An individual whose information is targeted by a warrant,  
12 order, or other legal process that is inconsistent with this chapter,  
13 or the California Constitution or the United States Constitution,  
14 or a service provider or any other recipient of the warrant, order,  
15 or other legal process may petition the issuing court to void or  
16 modify the warrant, order, or process, or to order the destruction  
17 of any information obtained in violation of this chapter, or the  
18 California Constitution, or the United States Constitution.

19 (d) A California or foreign corporation, and its officers,  
20 employees, and agents, are not subject to any cause of action for  
21 providing records, information, facilities, or assistance in  
22 accordance with the terms of a warrant, court order, statutory  
23 authorization, emergency certification, or wiretap order issued  
24 pursuant to this chapter.